

**Piper Realty Company and Scott Stone.** Case 7-CA-34377

May 23, 1994

**DECISION AND ORDER**

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On October 20, 1993, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings, and conclusions and to adopt the recommended Order.

In adopting the judge's decision, however, we rely solely on his finding that, regardless of whether employee Scott Stone was engaged in concerted activity, Stone's conduct was beyond the Act's protection.

According to credited testimony, Stone objected to the Respondent's new "supercrew" program under which maintenance employees worked together when preparing vacant units for rental. When the site manager, Kozan, and supercrew team leader Murany informed Stone of the new program on March 18, 1993, Stone adamantly opposed it. Stone insisted that he wanted to work alone as he did before, and questioned why they were upsetting things and "messing with" his job. Stone argued that a team approach had been unsuccessful before, and repeated that he wanted to work alone. Despite Kozan's explanations about why the new program was chosen, repeated statements that the decision had been made, and frequent requests that Stone give the program a chance, Stone insisted that he did not think the program would work, and that he wanted to work alone. In order to end the discussion, Kozan told Stone to report to the supercrew.

Stone's vocal opposition did not abate once he was assigned to the supercrew. Stone vigorously repeated the same arguments to team leader Murany and the supercrew, saying that he did not think that the program would work, that he wanted to work alone, and that he did not understand why they were messing with his job.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Murany informed Kozan that Stone still objected to the supercrew. Thereafter, Stone visited Kozan's office following his March 18 shift and asked Kozan if he had a problem. Kozan responded that he did not, and asked whether Stone had a problem. Stone then renewed his arguments against the supercrew, saying it would not work, that he wanted to work alone, and that he did not know why they were messing with his job. When Kozan repeated his rationale for adopting the new program, Stone persisted in objecting to the supercrew. At some point during the discussion, Stone stated that other employees also disliked the program.

After Kozan determined that nothing new was being said, he opened the door to his office, gestured toward it, and instructed Stone to give the new program a try. Stone remained seated, and argued more loudly. According to Kozan, who was credited, Stone told him in a loud and belligerent voice that: (1) he did not treat the men like men, but like animals; (2) nobody had the "balls" to tell him; (3) Kozan was "fucking with his job"; and (4) a lot of employees thought Kozan was "a fucking asshole." Kozan instructed Stone to give the program a try. Kozan also told Stone several times to leave his office, stating that he was saying nothing new. When Stone continued arguing and swearing, Kozan, in order to get Stone out of his office, told him to take the next day off with pay.

Because the door to Kozan's office was open for a portion of the discussion, clerical employees Brow and Edenburn overheard part of the conversation. Both testified that they had heard Stone shouting and swearing at Kozan. Brow said that she heard Stone call Kozan a "fucking asshole," tell him that he treated employees like dirt, and state that Kozan's claim that his door was always open was "bullshit." Brow said that Stone swore periodically throughout the discussion. Brow said that, at some point, she moved farther away from Kozan's office so that she would not hear the discussion; however, she said that she still heard Stone and Kozan.

Edenburn, who heard portions of the discussion between answering phone calls, testified that Stone told Kozan he had a "fucking problem" because he did not treat employees like human beings, and that Stone later repeated that Kozan had a "fucking problem." Edenburn said that she was shocked by Stone's comments and surprised that he was given a day off rather than being immediately fired. Edenburn, like Kozan and Brow, testified that Kozan did not swear at Stone during this discussion.<sup>2</sup>

<sup>2</sup> Although the testimony of Kozan, Edenburn, and Brow differ somewhat from each other, all agree that: (1) Kozan did not swear at Stone; (2) Stone swore and directed profanities at Kozan; (3) Stone's swearing and other intemperate remarks were loud enough to be heard outside the office; and (4) employees who overheard Stone's comments clearly were shocked.

Based on the above conduct, the judge concluded, and we agree, that Stone's conduct on March 18 cost him any protection to which he otherwise might have been entitled under the Act. Thus, although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect.<sup>3</sup> Here, Stone clearly went too far. As Kozan, Brow, and Edenburn testified, Stone was insubordinate and profane during his meeting with Kozan. Even if swearing was common in the workplace, what distinguishes it here is that Stone directed it at a supervisor, in his office, in the course of repeatedly resisting a work assignment. Moreover, Stone's comments were heated enough to be overheard by Brow and Edenburn, who clearly were shocked by Stone's conduct.

Under these circumstances, we adopt the judge's finding that Stone's conduct was outside the protection of the Act.

### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>3</sup>*NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), *enfg.* 148 NLRB 1379 (1964).

*Dennis Boren, Esq.*, for the General Counsel.  
*Hiram S. Grossman, Esq.*, of Flint, Michigan, for the Respondent.

### DECISION

#### STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on August 25 and 26, 1993, in Flint, Michigan. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging employee Scott Stone because he engaged in concerted protected activity. Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, both parties filed excellent briefs which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTIONAL MATTERS

Respondent, a Michigan corporation, is engaged in the management and rental of apartments, including a complex known as Sunridge Apartments in Flint, Michigan. During a representative 1-year period, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Flint location goods valued in excess of \$50,000 from points outside Michigan. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

Sunrise is a rental community composed of 584 units, including 480 apartments in 40 buildings and 104 townhouses. Respondent employs some 20 to 24 employees at Sunrise. The onsite manager is George Kozan. Among the employees at Sunrise are 8 to 10 maintenance employees. This includes so-called prepping employees who clean, repair, and prepare vacant apartments before they are rented, painters, and service request employees.

The record reveals that Scott Stone, a prepping employee who was employed since January 7, 1991, was one of a number of employees who complained about certain work-related matters, including the lack of paid holidays and health insurance, as well as use of outside painting contractors. Stone was one of the employees who raised the subcontracting issue at a December 1992 meeting of employees. There is no evidence that Respondent harbored any animus against Stone or any other employee for bringing such matters, some of which were resolved, to the attention of management. Indeed, there is testimony that Kozan praised Stone for his role in the successful effort to secure paid holidays for the employees.

The record also reveals that, in the course of an annual evaluation meeting in January 1993, Kozan told Stone that he was "sticking" his nose in other people's business around the office and "butting in" where he did not belong. There is no evidence that this was a reference to the work-related complaints mentioned above; in fact, there is other evidence that Stone was prone to gossiping and spreading gossip. In any event, the statement was an insignificant part of the meeting. When Stone asked whether he had to keep his mouth shut to be a good employee, Kozan replied in the negative. And Stone's evaluation was generally satisfactory because Kozan told Stone to see him again in about 6 months for his next raise.

In the next few weeks a number of maintenance employees, including Stone, spoke among themselves about work-related problems such as employee favoritism and the need for ordering parts. There seemed nothing unusual about these discussions, but there was a tentative decision to hold a meeting about these matters at the home of Tracy Murany, one of the maintenance employees who lived on the premises. This meeting was never held either at Murany's house or anywhere else. There is nothing in the record to suggest that Stone, Murany, or anyone else was penalized for any of these discussions.

In February 1993, Kozan decided to change the way the prepping employees performed their work. Prior to the change, the prepping function was performed by one or two workers and each performed essentially the same type of work. The change involved the creation of a super crew which required most or all prepping employees to work as a group under the direction of a leadman or supervisor. Kozan cleared the change with his superior and designated Tracy Murany as the super crew leader.

Over the period of several weeks in late February and early to mid-March, Kozan added two other employees to the super crew and, because there was apparently some resistance to the change, secured their agreement to give the new procedure a chance. Stone, who had, in recent weeks, been

working alone, was asked to join the super crew in a meeting with Kozan and Murany in Kozan's office on March 18, 1993.

At this initial March 18 meeting, Kozan explained the new procedure and the reasons for it. Stone objected to the new procedure and his inclusion in the super crew. He stated his opinion that the new procedure would not work and expressed his own preference for working alone. In fact, Stone repeatedly stated his objections to the new procedure, despite Kozan's numerous statements that he wanted to give the new procedure a try. As the General Counsel concedes, Stone was "vociferous in expressing his concerns." Kozan finally had to order Stone to leave his office and report to the apartment where the super crew was working.<sup>1</sup>

After some delay Stone reported to Tracy Murany for work with the super crew at the designated apartment. When he arrived, at about 3:30 pm, the rest of the crew, Randy Robinson and Randy Worda, as well as Murany, was present. Murany remained for about 15 minutes, during which time Stone continued stating his objections to the super crew concept and Murany gave work instructions before leaving. There is some dispute about what took place in the apartment at this time. Stone testified that he spoke briefly with Robinson alone in the kitchen and that Robinson expressed agreement with him about the unworkability of the super crew concept. Robinson did not testify, but Worda and Murany, who did, contradicted Stone on one point and corroborated him on another. They testified that Stone spoke with Robinson and the others in the same room and did not speak with Robinson in the kitchen; they also testified that Robinson expressed his agreement with Stone's views on the super crew. In any event, it is clear that Stone repeated his objections to the super crew concept in the presence of Murany and the others at this time.

Murany returned to Kozan's office and told him, in a closed door meeting that also dealt with other matters, that Stone was still objecting to the new super crew procedure. At about 4 p.m., his quitting time, Stone left the apartment where he was working and returned to the office. He waited until the Kozan-Murany meeting concluded and entered

Kozan's office. Stone asked Kozan if he had a problem. Kozan replied that he did not and asked whether Stone had one. Stone then repeated his objections to the super crew arrangement and his preference for working alone. He also mentioned that another employee agreed with his position, apparently referring to Robinson. Stone raised his voice, and began shouting and using profanity. Kozan repeatedly told Stone that he had made up his mind about the new procedure, but Stone kept arguing with him. The meeting finally concluded when Kozan told Stone to take the following day, Friday, off, with pay, and to return to work on Monday. As he left the office, according to Stone, he told Kozan that he, Kozan, had a problem.

Kozan credibly testified that he gave Stone a day off in order to get Stone out of his office and to give himself time to determine what to do about Stone under calmer circumstances. That evening he decided to fire Stone because of Stone's conduct in his office and his continued reluctance to accept the management decision that Stone was to work in the super crew. Kozan was also concerned because the two office employees, both women, had overheard Stone's tirade and his use of profanity.

On Monday morning, March 22, Kozan notified Stone of his discharge. He said that Stone was discharged for his insubordinate and uncooperative conduct and actions on March 18. Stone again raised his voice, argued and used profanity. The women office employees also overheard these remarks. Even when he left Kozan's office after being told to leave, Stone lingered outside. He left the premises only after Kozan threatened to call the police.

#### B. Discussion and Analysis

It is clear from the evidence that any concerted action undertaken by Stone prior to March 18, 1993, played no role in his discharge. The General Counsel concedes that the activities of March 18 are the "critical events in question." He does assert, however, that, in repeatedly arguing against the imposition of the super crew concept, Stone was speaking for and on behalf of himself and other employees and that he was fired for making such concerted complaints to management. I disagree.

I do not believe that Stone was raising a group concern and thus engaging in concerted activity when he repeatedly complained about participating in the super crew. Although he went out of his way in some parts of his testimony to emphasize the word "we" when he described his objections to the super crew concept, it is clear that he had not even talked to anyone about it until after the first meeting. He therefore could not have been voicing a group concern at that point. Moreover, Stone admitted telling Kozan that he preferred working alone. Indeed, even at the second meeting with Kozan, after he had elicited the support of one fellow employee, Robinson, Stone remained concerned mostly about his own situation. Thus, he testified that he wanted to speak to Kozan again because he was afraid that Murany had told Kozan that "I had stated *my* opinion and how *I* felt and that *I* was unhappy with the new situation and didn't think it was safe." (Emphasis added.) Nor was there any evidence that Robinson, who did not testify, either expressly or impliedly authorized Stone to speak for him or meant his view that the super crew concept would not work to be carried by Stone to management in the manner he did. After all, in an earlier

<sup>1</sup>The above is based on the credited testimony of Kozan and Murany, who essentially corroborated each other and impressed me as reliable and candid witnesses. I do not credit Stone, although he supported much of Kozan's account of this first of two meetings they had on March 18, including the fact that Stone expressed a preference to continue working alone. I specifically reject Stone's testimony that he told Kozan that he would give the new procedure a try; this is inconsistent with his subsequent conduct. As to the second meeting, discussed hereafter, Stone's differences with Kozan were sharper but no more believable. Kozan's account of the second meeting was essentially supported by the wholly reliable testimony of two office employees who overheard much of what was being said. Stone's account of this meeting was particularly vulnerable because he attempted to show that Kozan, and not he, first displayed anger and used profanity. This was not only refuted by the other witnesses but Stone's testimony was contradicted by his own pretrial statement. In addition, in assessing Stone's testimony and his demeanor, I have no doubt that he was the source of most of the heat in this second meeting, based in part, perhaps, on resentment that a fellow employee had been placed in a supervisory position with authority over him. I detected such resentment in his testimony. In these circumstances, I cannot accept Stone's testimony as reliable where it conflicts with that of Kozan or any other witness.

meeting with management officials, Robinson had muted his objections and specifically agreed, unlike Stone, to give the new concept a chance.

What happened here was that Stone objected to a work assignment—his own. This is not a concerted activity. Stone's reference to the fact that another employee supported his view of the work assignment does not transform this individual gripe into a group concern. The support of another employee, obtained shortly before the second meeting with Kozan, was incidental to Stone's highly personal objection to the plan, which was essentially the same one he made in the first meeting when he had no support for his position. In no sense could Stone's conduct be termed "a logical outgrowth of the concerns expressed by the group." *Alchris Corp.*, 307 NLRB 182 fn. 4 (1991).

However, even if it could be found that Stone was advancing a group concern in his second meeting with Kozan on March 18, it is clear that his conduct at that meeting, which he himself initiated, was so outrageous that it was unprotected. It was for this unprotected conduct that he was fired.

The testimony of the two office employees demonstrates Stone's insubordination and use of profanity in the second meeting with Kozan. The General Counsel asserts that one of the office employees testified that she overheard only one use of profanity. But this does not meliorate Stone's conduct. Kozan and the other office employee testified to more uses of profanity, and it is clear that both office employees were shocked at what they did overhear. Indeed, one testified that she was surprised that Stone was not fired on the spot but instead given a day off. Nor was it the use of profanity itself that rendered Stone's conduct unprotected. After all, at Sunrise, as in many working environments, use of profanity was not uncommon. What made the situation here different than normal employment-related banter was that Stone used profanity toward his superior, in the superior's office, in the course of repeatedly objecting to and resisting a work assignment. His comments were heated enough to be overheard by other employees. This is far more significant than how many times Stone used profanity.

In reliance on the testimony of office employee Becky Brow, the General Counsel contends that, in their second meeting, Kozan mentioned Stone's complaining to his fellow employees about the super crew concept. However, the mere mention of complaints to fellow employees does not mean

that Kozan's decision to discharge Stone was based on such complaints. It is clear from the thrust of Kozan's corroborated and credible account of the meeting that Kozan's problem with Stone was Stone's complaints to *him* about the super crew concept, and, more importantly, the manner of Stone's complaints to him. This is also apparent from Brow's explanation of her own testimony to the effect that Kozan objected to Stone's "bad attitude."

Significantly, Stone himself testified that his parting comment to Kozan, his boss, was that Kozan had a "problem." Unfortunately for Stone, Kozan's problem was Stone's insubordination and unwillingness to accept any kind of authority, a trait exhibited by Stone both in his dealings with Kozan and Murany and in his testimony before me. It was reasonable for Kozan to assume from Stone's heated and repeated objections to his work assignment that he would not easily accept working under Murany and the super crew concept. An employer does not have to put up with persistent objections to work assignments, whether individually or group based, especially where those objections are accompanied by profanity and verbal attacks on superiors. Kozan was perfectly candid in testifying that he could not be perceived to have backed down and given in to Stone after the latter's disrespectful and public tantrums and still retain any semblance of authority. This view was understandable and reasonable in the circumstances. Stone's insubordination was unprotected and this is why he was fired. Accordingly, I find that the General Counsel has failed to show by a preponderance of the evidence that Stone was fired for engaging in concerted protected activity.

#### CONCLUSION OF LAW

The Respondent has not violated the Act in any way.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.